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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DOES 1 – 4, Plaintiffs, vs. United States Attorney's Office, District of Nevada, Defendant.	Case No. 2:09-cv-01083-KJD-PAL **DOES' OPPOSITION TO DEFENDANT'S AMENDED MOTION TO DISMISS CASE AND MOTION TO QUASH**

I. INTRODUCTION

In response to an online article about a current tax trial taking place in Las Vegas, the DOES posted anonymous comments criticizing the U.S. government. When the prosecutor in the Kahre Case then issued a subpoena seeking identifying information for DOES and all the other anonymous commenters, the DOES initiated an action seeking, among other relief, to quash the original subpoena along with a second, narrowed subpoena. The DOES have also sought relief making clear that the subpoenas were unconstitutional, along with a protective order. The Government has not filed *any* response to the DOES' motions seeking to quash improper subpoenas and seeking a protective order protecting against future abuse of grand jury subpoenas. Instead, the government filed a motion to dismiss the DOES' action which completely fails to address the important substantive claims raised by the DOES and ignores the realities of the matter at hand.

This matter is not moot and the government's motion to dismiss must be denied. Contrary to the government's suggestion, a motion to quash a subpoena does not become moot once compliance with said subpoena has taken place because compliance does not mean that there is no further relief available. This Court can still provide relief to the plaintiffs by preventing the use of any information gleaned from the complied-with subpoena, mandating the destruction of any such information, and issuing a protective order to prevent future abuses of the grand jury subpoena to obtain information about critics of the government's position in the Kahre Case. Further, DOES did not merely move to quash the subpoenas: they have also sought a protective order and further asked that "all appropriate steps [be] taken to protect the rights of people to comment anonymously."

Allowing this case to be heard on its merits is essential to prevent future grand jury abuses and to allow the DOES to challenge the use of subpoenas in a fashion that violated their First Amendment rights. Even if immediate relief were not available to the DOES, the current action concerns an issue that is capable of repetition, yet evades review; thus, it is still a live controversy that must be adjudicated on its merits. The government's motion to dismiss must be denied.

II. PROCEDURAL BACKGROUND AND CASE SUMMARY

Assistant United States Attorney J. Gregory Damm ("AUSA Damm") issued a grand jury subpoena ("First Subpoena") seeking identifying information about each and every public comment about an article[1] posted on the Las Vegas Review-Journal's website about a controversial ongoing federal tax trial in which he is serving as a prosecutor, *United States of America vs. Kahre et al.* (2:05-cr-121-DAE-RJJ) ("Kahre Case"). The Review-Journal refused to comply at first, making public this refusal on June 7, 2009, in an op-ed written by Thomas Mitchell, the Editor of the Review-Journal.[2]

On June 16, 2009, three anonymous commenters to the Review-Journal Article ("DOES 1-3"), along with the ACLU of Nevada, filed a motion to intervene, motion for protective order, and motion to quash the first subpoena. On the same day, the United States served the Review-Journal with a revised grand jury subpoena ("Second Subpoena"), which only sought the identifying information of the authors of the two comments.[3] (Doc. # 14, Am.Mot. to Dismiss at p. 3, attached as Ex. 5 to Amended Motions.) On June 18, 2009, the Review-Journal complied with the subpoena, sending AUSA Eric Johnson "the documents in the possession of the Review-Journal responsive to [the Second Subpoena]." *Id.* at 4. On June 22, 2009, four anonymous commenters to the Review-Journal Article ("DOES 1-4"), as well as the ACLU of

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[1] Joan Whitely, *Employer's gold, silver payroll standard may bring hard time*, Las Vegas Review-Journal, May 26, 2009, http://www.lvrj.com/news/46074037.html ("Review-Journal Article"), attached as Ex. 4 to Amended Motions.

[2] Thomas Mitchell, *Subpoena seeks names – and lots more – of Web Posters*, Las Vegas Review-Journal, June 7, 2009, http://www.lvrj.com/opinion/47141327.html, attached as Ex. 2 to Amended Motions.

[3] The two comments in question, which as of June 16, 2009 no longer appear on the Review-Journal's website, are as follows:

(1.) A commenter using the name "Mike" wrote that the "12 dummies on the jury who will convict [Kahre] . . . should be hung along with the feds;"

(2) A commenter using the name "Provider One" wrote, "I bid 10 Quatloos that Christopher Maietta does not celebrate his next birthday." Christopher Maietta is an attorney for the prosecution in the *Kahre* case.

Nevada, filed an amended motion to quash the second subpoena, along with an amended motion to intervene and an amended protective order (Doc # 9, 17, 18, "Amended Motions".)

In the Amended Motions, DOES set forth several substantive arguments which the government has not rebutted. First, DOES contend that their critical Internet comments, which are neither "true threats" nor immediate incitements to violence, but are rather political speech that merits the full protection of the First Amendment. (Am. Mots., at pp. 17-20). Furthermore, the right to voice these criticisms anonymously is an important aspect of that protected speech. Anonymity must be maintained in order to prevent the very type of speech-chilling backlash and harassment the government is capable of carrying out, for example, by inducing a fear of prosecution and forcing a formerly anonymous person to appear in front of a grand jury simply for posting political criticisms on the Internet. (Am. Mots. at p. 20.) Second, DOES argued that the subpoenas, in part because of this chilling effect on commenters, and potentially jurors, constituted prosecutorial abuse.[4] To protect the sacrosanct right to anonymous political speech and to prevent prosecutorial abuse of the grand jury subpoena powers, DOES requested that the subpoena be quashed and that a protective order be entered preventing further subpoenas be issued. (Am. Mots. at p. 1.)

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[4] Indeed, the government appears to have not even complied with its own regulations governing subpoenas issued to the news media. *See* 28 C.F.R. § 50.10(c) (2008) (requiring negotiations between prosecutors and the media before a "subpoena to a member of the news media is contemplated); 28 C.F.R. § 50.10(e) (2008) (requiring express authorization of the Attorney General before issuing subpoena "to any member of the news media."); 28 C.F.R. § 50.10(f)(1) (2008) (requiring "reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation" before seeking Attorney General's authorization for a subpoena; furthermore, it bars the subpoena from being used "to obtain peripheral, nonessential, or speculative information."); 28 C.F.R. § 50.10(f)(6) (2008) ("Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter..."). If the prosecution had complied with these regulations, there would not have been a need for two subpoenas.

On June 26, 2009, the government filed a sealed, *ex parte* Motion to Dismiss the case as well as Plaintiffs' Amended Motion to Quash. (Doc. 7.) On June 26, 2009, the government filed an amended version of the motion to dismiss (Doc. 14). The Amended Motion to Dismiss was filed under seal but not *ex parte.*[5]

III. ARGUMENT

A. Motions to Dismiss are Disfavored

In order to prevail in a motion to dismiss, a defendant must show that "it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief." *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1120 (9th Cir. 2007) (quoting *McGary v. City of Portland*, 386 F.3d 1259, 1261 (9th Cir. 2004)). In their Amended Motions, DOES allege several facts in support of the claim that the Second Subpoena unconstitutionally infringes on DOES' First Amendment right to anonymous political speech. In the motion to dismiss, the defendants decline to rebut any of DOES' substantive claims. The facts alleged by DOES remain unchallenged, and support a justiciable claim that they are entitled to the relief they seek. For example, the government does not argue that the comments in question are unprotected speech, such as incitements to imminent violence or "true threats." As detailed in the Amended Motions, the commenters' speech is protected by the First Amendment and the DOES are entitled to the relief they seek, which is not limited to stopping compliance with the subpoenas. Further, as detailed below, given the fears cited by the DOES about the potential misuse of their information and the inherent threat of prosecution the subpoenas carry, the relief they seek is not moot.

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[5] DOES are separately moving to obtain access to the *ex parte*, initial motion to dismiss and to make all filings in this case open to the public.

B. Despite the Review-Journal's Compliance with the Subpoena, the Current Action is not Moot and Must be Adjudicated on its Merits.

Defendants state that "live issues do not now exist, and effective relief can no longer be provided" to the DOES, and thus that the Amended Motions are moot. (Mot. to Dismiss at p. 5.) (internal quotation marks omitted). However, despite the Review-Journal's compliance with the amended subpoena, effective relief may yet be granted to the DOES, thus making the relevant issue live. But even if there were no avenues of effective relief available to the plaintiffs, this issue clearly falls under an exception to the mootness doctrine; namely, it is an issue that is capable of repetition, yet evades review. For these reasons, the motion to dismiss should be denied.

1. Mere Compliance with a Subpoena does not Moot Motions to Quash the Subpoena.

The government correctly contends that a case is moot when there is no actual controversy at hand, when the parties no longer have an interest in the outcome of the case, or no effective relief can be provided. (Mot. to Dismiss at pp. 4-5.) However, these boilerplate principles of mootness doctrine address neither the infringement of the First Amendment right to free speech nor grand jury subpoenas and by neglecting to account for alternate avenues of relief that can be granted to the DOES by this Court, the defendants incorrectly leap to the conclusion that the present case is moot.

The Review-Journal's compliance with the subpoena does not moot the motion to quash the subpoena, because a court can still grant the DOES appropriate and effective relief. Rule 57 of the Federal Rules of Criminal Procedure gives district court judges and magistrates wide latitude to fashion appropriate relief. Fed. R. Crim. P. 57(b) ("Procedure When There Is No Controlling Law") ("A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district….).[6] *See also Church of Scientology of California v. United States*, 506 U.S. 9, 13 (1992) (appeal of summons issued by IRS not moot even though tapes sought by summons had been produced because court could render partial relief by ordering the return or destruction of the tapes); *In re Grand Jury Subpoenas Duces Tecum*, 78 F.3d 1307, 1310-11 (8th Cir.1996) (court can provide effective partial relief by ordering return or destruction of documents produced during compliance with an improper subpoena, which prevents the issue from becoming moot); *In re Grand Jury Subpoenas Dated December 7 and 8*, 40 F.3d 1096, 1100 (10th Cir.1994) (ordering return or destruction of records after compliance with a subpoena could provide at least a modicum of relief, and thus the issue is not moot).

Given its wide latitude to fashion relief, the court is capable of providing far more than a modicum of relief to the DOES. First, by ordering the destruction of any information already provided to the government, the court would protect the DOES from further use of said information to violate their First Amendment rights to anonymous free speech. After all, there is no way for the DOES to know how the government has used information gained by the subpoena. This, in turn, means that destruction of the information would, at the very least, increase the likelihood that the DOES' identities remain unknown. A protective order barring future use of any information obtained -- directly or indirectly -- through the subpoena would also provide more than a modicum of relief to the DOES. It would prevent prosecution of the

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[6] Under the provisions regarding protective orders in the discovery context, the rules provide that "[a]ny time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The Court may permit a party to show good cause by a written statement that the court will inspect ex parte." Fed. R. Crim. P. 16(d)(1). Here, there is good cause given the First Amendment concerns.

DOES and it would prevent the government from going to an ISP provider to get information about them.

By declaring the subpoenas unconstitutional, preventing future subpoenas to the Review-Journal seeking identifying information of anonymous commenters, preventing the government from issuing subpoenas to Internet Service Providers (ISPs) seeking further identifying information of anonymous commenters, and preventing prosecution of the DOES, the court would provide a very strong measure of relief. The existence of such avenues of relief means that this action is far from moot; oppositely, such relief would greatly aid the DOES in their ability to exercise their First Amendment right to anonymous speech on the Internet without fear of government reprisal and retaliation.

2. The Current Action Concerns an Issue that Is Capable of Repetition, Yet Evading Review.

Further, even if no immediate relief were possible, this case would not be moot. The Supreme Court has recognized an exception to the mootness doctrine when an issue at bar is capable of repetition, yet evades review. *See Roe v. Wade*, 410 U.S. 113, 125 (1973) (human gestation period does not last long enough to accommodate appellate procedure, and thus the issue of whether a state's abortion ban is constitutional as applied to an expectant mother does not become moot once her pregnancy is carried to term). Two elements must be met for this exception to the mootness doctrine to apply in a given case: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (quoting *Weinstein v. Bradford*, 423 U.S.

147, 149 (1975)). Because both prongs of this test are met, the DOES' motion to quash the subpoena cannot be dismissed as moot.

The first element is met in this case, because, if this action were deemed moot, the third party DOES could not possibly assert their rights and challenge subpoenas. As detailed in the DOES' Amended Motions, third parties have the right to challenge subpoenas when their First Amendment rights are implicated. That the recipient of the subpoena has complied does not change this analysis. Parties typically respond quickly to subpoenas, thus, the question of third party rights is likely to evade review. *See Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 6 (1986) (closure order issued to press during criminal prosecution is likely to evade review because "criminal proceedings are typically of short duration," and thus is not moot even after trial ends); *Globe Newspaper Co. v. Superior Court for Norfolk*, 457 U.S. 596, 603 (1982) (same); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (human gestation period does not last long enough to accommodate appellate procedure); *U.S. E.P.A. v. Alyeska Pipeline Service Co.*, 836 F.2d 443, 445 (9th Cir. 1988) (holding that order enforcing EPA subpoena is ripe for review even though subpoena had already been complied with); *Olagues v. Russoniello*, 797 F.2d 1511, 1516 (9th Cir. 1986) (noting that voter registration investigations are sometimes of short duration, which can preclude their review by an appellate court). This prong is especially relevant here, where the whole question of third party rights with respect to subpoenas is generally one that not only evades review, it evades any kind of public scrutiny. Grand jury issues are usually issued – and complied with – in secret. It is the rare recipient that is a newspaper that makes the matter public.

In order to meet the second element of this exception to the mootness doctrine, the plaintiff must "establish a demonstrated probability that the same controversy will recur involving the same litigants." *Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1390 (9th Cir. 1985) (citing *Murphy*, 455 U.S. at 482). It is highly probable that the Review-Journal will continue to publish articles on the Kahre trial on the Internet, as the Review-Journal publishes the vast majority of its articles on the Internet and the Kahre Case is a matter of immense local interest. Furthermore, it is probable that some of the people who read the article will comment on it anonymously using the Review-Journal's online commenting mechanism, as an overwhelming number of Review-Journal articles receive such comments. Because comments on the original article were overwhelmingly pro-Kahre, it is also very likely that any subsequent articles on the Kahre trial will be met with similarly strongly-worded anonymous comments which a prosecutor may interpret as threats to jury or counsel that warrant issuing a subpoena to the Review-Journal. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 545 (1976) (question of expired gag order's constitutionality not moot because press is very likely to cover subsequent trials during which the government might issue gag orders); *cf. City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) (holding that because it was purely speculative whether respondent would be placed in a chokehold by a Los Angeles police officer in the future, there was no reasonable expectation of being subjected to the same action); *Lee*, 766 F.2d at 1390-91 (noting that a convoluted combination of unlikely events were necessary to bring about further litigation between the parties, and thus there was no reasonable expectation of being subjected to the same action). More broadly, it is highly probable that the U.S. Attorney's office will use its grand jury powers again and the limits of those powers must be made clear to prevent future similar subpoenas.

By determining now that this issue is capable of repetition and evades review and allowing this issue to be decided on its merits, the court will prevent future litigation before it even begins. After all, anonymous and pseudonymous comments are a staple of discourse throughout the Internet. By promulgating a rule that specifies when information about anonymous Internet commenters can be gained via grand jury subpoena, the court will provide much-needed guidance not only to prosecutors who wish to unmask anonymous Internet commenters, but to the commenters themselves.

IV. CONCLUSION

Justice demands that the question of the subpoenas' constitutionality be decided on the merits even if the second subpoena has already been complied with. Because more than a *de minimis* level of relief is available for DOES 1-4 in spite of the Review-Journal's compliance, and because this issue is extremely capable of repetition yet evading review, this issue cannot be dismissed on grounds of mootness. For the foregoing reasons, DOES 1-4 and the ACLU of Nevada respectfully request that this Court deny the defendants' motion to dismiss.

Respectfully submitted, this 13th day of July, 2009,

By: _______/s/________________

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